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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Appellants,

v.

LEONARD PAUL HODORY, *Appellee.*

On Appeal from the United States District Court Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

The Chamber of Commerce of the United States of America respectfully moves for leave to file the attached brief *amicus curiae* on behalf of Appellants in the present case, pursuant to Rule 42 of the Rules of this Court. Counsel for Appellant has given consent for this filing.

1. The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700)

state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organization in the United States.

2. In order to represent its members' views on questions of importance to their vital interest and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* (and as a party) in a wide range of significant labor relations matters before this Court; *e.g. Super Tire Enginering Co., et al.* v. *McCorkle, et al.,* 416 U.S. 115 (1974); *The Chamber of Commerce of the United States of America, Petitioner* v. *Robert Francis, et al., Respondent,* Petition for Writ of Certiorari pending; *Geduldig* v. *Aiello, et al.,* 417 U.S. 484 (1974); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.,* No. 73-1256; *Boy's Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.,* 397 U.S 99 (1970)

3. The underlying question presented in this case is whether a state may provide financial support to one of the parties to a labor dispute—the union—by granting public benefits to workers temporarily idled as a direct result of such a dispute. This case, then, is another in the growing list of decisions involving the issue of whether public funds may be provided to workers participating in or affected by a labor controversy.

The Chamber's concern about the manner in which this question will be resolved is evinced by its repeated participation in litigation presenting this issue. Thus, the Chamber has participated as *amicus curiae* before this Court in *Super Tire, supra,* and as a party before various lower courts.[1] Indeed, the Chamber has been the only party who has consistently litigated the questions presented by this cause and is therefore uniquely able to contribute to their resolution.[2]

Respectfully submitted,

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[1] The Chamber was permitted to intervene and participate in the evidentiary hearing in *Hawaiian Telephone Company,* 378 F. Supp. 794 (D. Hawaii). The Chamber was permitted to intervene in *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (CA 1, 1973) *cert. den.* 414 U.S. 858 (1973); *Russo* v. *Kirby,* 453 F.2d 548 (CA 2, 1971); *U.S. Chamber of Commerce* v. *Francis* (CA 4 No. 74-1991); and, over opposition the Chamber has been permitted to participate as a party-plaintiff in pending proceedings in *Dow Chemical Co. and the Chamber of Commerce of the United States of America* v. *Taylor,* 57 F.R.D. 105 (E.D. Mich. Civil No. 38664).

[2] The Third Circuit in *Super Tire* observed that the Chamber, while not designated as a formal party, was the *real* party in interest whose presence indicated an ongoing interest in the issues raised in that litigation. *Super Tire* raised issues that are closely related to the issues presented in the instant case.

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AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

A. This Case Together with The Chamber of Commerce of the United States of America v. Francis, et al., and Kimbell, Inc., et al. v. Employment Security Commission of the State of New Mexico, Present Significant Unanswered Questions Concerning the Permissibility of Public Assistance to Strikers and to Persons Idled as a Consequence of a Strike.

The question presented in this case is whether a state's statute denying unemployment compensation benefits to non-striking employees who are laid off solely because of a strike contravenes the United State's Constitution. This case is one of the genre that involves questions raised by the grant or denial of public subsidies to striking employees or to those who, as here, are laid off directly because of a labor dispute. These cases have continued to occupy the

attention of lower courts and commentators down through the years.[1] This Court has not, as yet, addressed these significant questions.[2]

Indeed, pending before this Court are petitions in two cases that present questions similar to that raised by this case: *The Chamber of Commerce of the United States of America* v. *Francis* (Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit pending); *Kimbell, Inc., et al.* v. *Employment Security Commission of the State of New Mexico, et al.* (Jurisdictional Statement pending). In *Francis* the question is:

[1] *E.g., I.T.T. Corp.* v. *Minter,* 435 F.2d 909 (1st Cir.), *cert. denied,* 402 U.S. 933, *rehearing denied,* 404 U.S. 874 (1971); *National Gypsum Co.* v. *Administrator, La. Dept. of Employment Security,* 313 So.2d 527 (La. Sp. Ct. 1975), *appeal dismissed* 44 U.S.L.W. 3340 (December 9, 1915) (No. 75-299); *Kansas City Star Co.* v. *Dept. of Industry, Labor and Human Relations,* 211 N.W.2d 488 (Wis. Sup. Ct. 1973), *rehearing denied,* 217 N.W.2d 666 (1947)), *cert. denied,* 419 U.S. 870 (1974); see also *Grinnell Corp.* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973); *Hawaiian Telephone Co., et al.* v. *Hawaii,* 405 F. Supp. 275 (D. Hawaii, 1976); *Johns-Manville Prods.* v. *Doyal,* 510 F.2d 1196 (5th Cir. 1975); Thieblot and Cowin, *Welfare and Strikers; The Use of Public Funds to Support Strikers,* Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania Press (1972); Carney, *The Forgotten Man on the Welfare Roll: A Study of Public Subsidies for Strikers,* Washington University Law Quarterly, Volume 1973, Number 3.

[2] In *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974) this Court recognized the significance of these questions and observed:

> "It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of law regulating labor-management disputes."

> "Whether striker eligibility for welfare benefits is contrary to and inconsistent with the purpose of the Social Security Act and contrary to national labor policy expressed in the National Labor Relations Act."

In *Kimbell* the issue presented is:

> "Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?"

In *Francis,* an employee of American Smelting and Refining Co., Robert Francis, joined a strike against that employer in support of his collective bargaining representative. While on strike Francis sought unemployment benefits. The State of Maryland denied Francis' application for these benefits on the ground that his unemployment was voluntary and resulted from his decision to participate in a strike. Francis then applied for federal benefits under the Aid for Dependent Children—Unemployed Father program (AFDC-UF). Decisions below resulted in striking employees—whose need for assistance arose only because of their decision to strike—being unqualifiedly enrolled in the AFDC-UF program.[3]

In *Kimbell,* as in *Francis,* during a strike occasioned by a bargaining dispute, employes, striking to support their union's bargaining demands, applied for unemployment compensation benefits. Unlike Francis, these strikers were granted these benefits by

[3] See the Petition for Writ of Certiorari in *Francis,* pp. 2-6.

the State of New Mexico and these grants were upheld by that State's Supreme Court.[4] That court refused to follow an earlier decision of a federal district court in *Hawaii Telephone Co., et al.* v. *Hawaii,* 405 F. Supp. 275 (D. Hawaii, 1976). The *Hawaii* court had held that the State of Hawaii's award of unemployment compensation benefits to strikers impermissibly altered the relative economic strength of union versus employer in their bargaining relationship and thereby encroached upon the field preempted by the National Labor Relations Act in contravention of the Constitution's supremacy clause.

In the instant case, employee Hodory was one of approximately 1250 employees laid off by U.S. Steel or Republic Steel Corporation at their Ohio plants because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two employers. Hodory applied to the State of Ohio for unemployment benefits. His application was denied by that State pursuant to § 4141.29(D)(1)(a) of the Ohio Revised Code.

> "(a) *His unemployment was due to a labor dispute* other than a lockout *at any factory, establishment, or other premises* located in this or any other state and *owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute . . .*" (emphasis supplied).[5]

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[4] See Jurisdictional Statement in *Kimbell.*

[5] During the pendency of this lawsuit § 4141.29(D)(1(a) O.R.C. was amended to provide, in pertinent part, that:

> ". . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . ."

This amendment, Am. Sub. Senate Bill 173, however, did not become effective until December 2, 1975, and is not to be retroactively applied. Moreover, the amendment does not moot the issues raised herein, since it will not affect the status of plaintiff and the class for the period during which they were denied benefits pursuant to § 4141.29(D)(1)(a).

The sole basis for denying Hodory's application for benefits during the strike was that he was eligible under the labor dispute disqualification in § 4141.29 (D)(1)(a) O.R.C.

The court below held that the application of this disqualification to deny benefits to individuals who were unemployed through no fault of their own and who did not participate in or benefit from a labor dispute involving another union and their employer violated the Constitution.

In reaching its conclusion, the *Hodory* court observed that the labor dispute disqualification, if applied to employees who strike to support bargaining demands, would be Constitutional, since the grant of public benefits to those strikers would place their employer at an unfair disadvantage in negotiations with their union. The court apparently recognized that the payment of public benefits to strikers reduces economic pressure on them and accordingly diminish their incentive to reach a fair settlement. Moreover, employers aware of the availability of public benefits for strikers are more likely to accept union demands that

are unreasonable and economically unsound, because these employees realize that the union and its members—assisted by public funds—have little to lose by a long strike.

B. The Decision Below, Like the Decisions in Francis and Kimbell, Is Contrary to National Labor Policy and, Like the Decision in Kimbell Contravenes the Supremacy Clause.

Francis and *Kimbell* directly focus upon the issues involved when federal or state funds are granted (*Kimbell*) or denied (by the State in *Francis*) to employees striking to support collective bargaining demands. The instant case brings to this Court a variant of these questions since the State of Ohio has elected to deny benefits not only to strikers, but also to other persons idled as a direct consequence of a strike.

As stated, the court below in this case appears to support the position that its is constitutionally permissible to deny public funds to *strikers*. This position is consistent with the views advanced by the Chamber in *inter alia Francis, supra,* and *Hawaii Telephone, supra:* the Chamber has contended consistently that federal labor and welfare policy—and the operation of the Supremacy Clause—have determined that strikers are not eligible for federal or state subsidies in the form of unemployment or welfare benefits.[6]

[6] This Court has previously observed that as a matter of law the question of the permissibility or impermissibility of public assistance to strikers is to be resolved by reference to *national labor policy:*

> "The question, of course, is whether Congress, explicitly or implicitly has ruled out such assistance in its calculus of law regulating labor-management disputes."

There can be no cavil over the proposition that the national policy of free collective bargaining is the cornerstone of the federal labor relations system embodied in the NLRA (29 U.S.C. § 161 *et seq.*). This Court has consistently recognized that the resolution of labor disputes must depend solely upon the strength and resolve of the contesting private parties. In *N.L.R.B.* v. *Insurance Agents Union,* 361 U.S. 477, 489 (1960), this Court observed that the federal scheme of labor relations requires that a collective bargaining relationship involve a "brute contest of economic power." Similarly, in *H. K. Porter* v. *N.L.R.B.,* 397 U.S. 99, 108 (1970), this Court stated that ". . . the results of the contest [are to be left] to the bargaining strengths of the parties."

The foregoing demonstrates that the national labor policy mandates that the resolution of labor controversies depends upon the strength and tenacity of the bargaining parties themselves. Thus, under the federal scheme of labor relations, each bargaining party recognizes that he will be required to endure the immediate and future consequences of a continued disagreement, a strike or a lockout, and that this cost to him may exceed the expense of compromise and agreement. As long as the parties recognize that they alone must bear the risks attendant to intransigence and the utilization of economic force, the collective bargaining process will continue to produce the voluntary compromises that Congress intended.[7] It follows

[7] The legislative history is replete with references to such congressional intent. Senator Taft stated:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make

that federal labor policy interdicts public financial support during a labor dispute for one or the other of the bargaining parties, since this support, by relieving an intractable party of the cost of a prolonged disagreement, will in effect forestall voluntary compromise.[8]

The foregoing demonstrates that the Supremacy Clause prohibits a *state* from utilizing its funds to

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an unreasonable demand and get away with it. . . . If there is reasonable equality at the bargaining table, I believe there is much more hope for labor peace." I NLRB Legislative History of the Labor Management Relations Act at 1007 (1947).

As this Court observed in *Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959):

". . . The goal of federal labor policy . . . is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective bargaining, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife . . ."

As Mr. Justice Frankfurter stated:

"[The NLRA] leaves the adjustment of industrial relations to the free play of economic forces (and) seeks to assure that the play of those forces be truly free." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 183 (1941).

[8] The comprehensive study of Thieblot and Cowin, *Welfare and Strikers: The Use of Public Funds to Support Strikers*, Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania Press (1972), similarly observed:

"The overwhelming weight of opinions unearthed by our studies, including those of strikers, union officials, and management personnel, was that the payment of tax supported benefits to strikers, by greatly reducing the economic pressure on those strikers, substantially diminished the back pressures from union members to settle and thereby made strikes last longer. Moreover, it seemed clear in the case studies that strike settlements were made more costly as managements, realizing what was occurring, paid more dearly to end the dispute," at 218.

provide public assistance to persons who engage in a strike to support a labor dispute. *Local 20, Teamsters* v. *Morton*, 377 U.S. 252 (1964); *Hill* v. *Florida*, 325 U.S. 538 (1944); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963).[9]

Accordingly, insofar as the Ohio statute involved in this case is applied to *strikers*, it is consistent with federal policy.

Furthermore, for reasons advanced by the State of Ohio, the payment of state benefits to persons idled as a direct consequence of a labor dispute—as ordered by the court below—transgresses the Supremacy Clause. It follows that the determination of the State to disqualify such persons is not unconstitutional.

The instant case, *Francis* and *Kimbell* considered together present significant and recurring questions which this Court has not considered.[10] Lower courts have reached different results when examining these questions,[11] and important constitutional issues and federal policies are involved. Accordingly, review of these questions is timely and this case, together with *Francis* and *Kimbell* provide ready vehicles to embark upon this review.

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[9] This conclusion is unaffected by the fact that a state's policy in granting state funds to strikers is not intended to be a subsidy for them. This Court has held that the applicable standard for determining the validity of state legislative policy is whether the law impedes the accomplishment of a federal purpose; if it does, the intent or objective of the state policy is irrelevant. *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1962); *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

[10] See note 1, *supra*.

[11] Compare for example *Hawaii Telephone, supra*, with the instant case and *Kimbell*.

CONCLUSION

Accordingly, for the reasons set forth above as well as those advanced by the State of Ohio, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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